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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/637,621	08/11/00	LOVATT	C 2500.096US8

EXAMINER	
LANGEL, W	
ART UNIT	**PAPER NUMBER**
1754	3

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DATE MAILED: 02/12/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.	Applicant(s)
637621	Lovatt
Examiner	**Group Art Unit**
Langel	1754

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Response

A SHORTENED STATUTORY PERIOD FOR RESPONSE IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a response be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for response specified above is less than thirty (30) days, a response within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for response is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication .
- Failure to respond within the set or extended period for response will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Status

☐ Responsive to communication(s) filed on _____.

☐ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

☒ Claim(s) 25-30 is/are pending in the application.

Of the above claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 25-30 is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 11 9(a)-(d).

☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been

☐ received.

☐ received in Application No. (Series Code/Serial Number) _____.

☐ received in this national stage application from the International Bureau (PCT Rule 1 7.2(a)).

*Certified copies not received: _____.

Attachment(s)

☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____

☒ Notice of References Cited, PTO-892

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Interview Summary, PTO-413

☐ Notice of Informal Patent Application, PTO-152

☐ Other _____

Office Action Summary

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 25-30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Robertson and Boyer (pages 396-401). Robertson and Boyer report observations that orthophosphites did not interfere with enzymatic reaction to phosphate, and suggested the anion might be a useful buffer near neutral pH and that the orthophosphites were relatively non-toxic to impact yeast and animal cells. See particularly the "Discussion" on page 400. The difference between the fertilizer of Robertson and Boyer, and that recited in applicant's claims, is that Robertson and Boyer do not specifically disclose that the fertilizer should have a pH less than about 2.5. Robertson and Boyer disclose on page 396 that sodium hydrogen phosphite solutions are diluted to the desired concentration. Accordingly, Robertson and Boyer recognize that the concentrated phosphorus fertilizer may be diluted with water to obtain a use-dilution fertilizer. The concentrated phosphorus fertilizer of Robertson and Boyer would

inherently have a low pH, since it is concentrated. It would be prima facie obvious to provide such a concentration of the orthophosphites in the composition of Robertson and Boyer to provide a pH of less than about 2.5, as recited in applicant's claims. Accordingly it would also be obvious to employ a concentration of such orthophosphites in an amount of about 30 weight percent to about 46 weight percent in the fertilizer of Robertson and Boyer, as recited in applicant's claims 27 and 30.

The non-statutory double patenting rejection, whether of the obviousness-type or non-obviousness-type, is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent. *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); and *In re Goodman*, 29 USPQ 2d 2010 (Fed. Cir. 1993).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(b) and (c) may be used to overcome an actual or provisional rejection based on a non-statutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.78(d).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 25-30 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-22 of U.S. Patent No. 5,514,200. Although the conflicting claims are not identical, they are not patentably distinct from each other because they would be prima facie obvious over each other.

Claims 25-30 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-34 of U.S. Patent No. 6,113,665. Although the conflicting claims are not identical, they are not patentably distinct from each other because they would be prima facie obvious over each other.

Claims 25-30 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-52 of U.S. Patent No. 5,830,255. Although the conflicting claims are not identical, they are not patentably distinct from each other because they would be prima facie obvious over each other.

Any inquiry concerning this communication should be directed to Wayne A. Langel at telephone number (703) 308-0248.

WAL:cdc
February 12, 2001

Wayne A. Langel

WAYNE LANGEL
PRIMARY EXAMINER
GROUP 1113